ORIGINAL

DOCKET FILE COPY ORIGINAL

BEFORE THE

# Federal Communications Commission

WASHINGTON, DC

APR 11 1996

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Section 302 of the Telecommunications Act of 1996 | ) | CS Docket No. 96-46 |
| | ) | |
| Open Video Systems | ) | |
| | ) | |
| | ) | |
| | ) | |
| In the Matter of | ) | |
| | ) | |
| Telephone Company-Cable Television Cross-Ownership Rules Sections 63.54-63.58 | ) | CC Docket No. 87-266 (Terminated) |
| | ) | |

## REPLY COMMENTS OF TIME WARNER CABLE


Brian Conboy
Michael Hammer
Michael G. Jones
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Attorneys for
Time Warner Cable


11 April 1996

TABLE OF CONTENTS

BEFORE THE

# Federal Communications Commission

WASHINGTON, DC

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Section 302 of the Telecommunications Act of 1996 | ) | CS Docket No. 96-46 |
| | ) | |
| Open Video Systems | ) | |
| | ) | |
| | ) | |
| | ) | |
| In the Matter of | ) | |
| | ) | |
| Telephone Company-Cable Television Cross-Ownership Rules Sections 63.54-63.58 | ) | CC Docket No. 87-266 (Terminated) |

**REPLY COMMENTS OF TIME WARNER CABLE**

Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner"), hereby submits its reply comments in the above-captioned proceeding.[1]

## I. INTRODUCTION AND SUMMARY.

The initial comments confirm that, when adopting regulations to govern the establishment and operation of Open Video Systems

[1] Implementation of Section 302 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking in CS Docket No. 96-46, FCC 96-99 (released 11 March 1996) ("Notice").

("OVS"), the Commission needs to focus its attention on two fundamental goals:

1. Establishment, in advance, of effective safeguards to ensure that local exchange carriers ("LECs") do not use their monopoly power in the telephony business to reduce competition in the video distribution and telephone businesses, and
2. Promulgation, in advance, of specific, minimum standards required to satisfy the regulatory obligations imposed by the Telecommunications Act of 1996.

The initial comments reflect widespread acknowledgment of the importance of these goals:

- Numerous commenters urge the Commission to restrain LEC anticompetitive incentives by requiring LECs to offer video services only through structurally separate subsidiaries.
- A number of commenters agree that (1) proper cost allocations, and specifically, the proper application of Part 64, is an indispensable requirement if monopoly ratepayers are to be protected from bearing the burden of LEC video entry aspirations; (2) the Commission should modify Part 64 in this proceeding; and (3) LECs must file cost allocation manual revisions and otherwise demonstrate compliance with the revised Part

64 rules prior to the Commission granting OVS certification.

- Numerous LEC commenters urge the Commission merely to codify the broad requirements of Section 653 and fill in any regulatory gaps later on an ad hoc basis through the complaint process. This suggestion is misguided and fails to promote a consistent regulatory framework. As demonstrated below and in Time Warner's Comments, adoption of specific minimum standards is the only way OVS will fulfill Congressional intent to create a fundamentally different type of MVPD, rather than merely an unregulated cable system.

The initial comments raise several other important issues, on which Time Warner urges the Commission to reach the following conclusions:

- The OVS gross revenue fee should be calculated based on total OVS operator revenues;
- Neither OVS nor cable operators should be required to carry both the NTSC and ATV feeds of must-carry broadcasters during the transition to digital;[2]

---

[2] Time Warner believes that the issue of whether the must-carry rules can or should be extended to include multiple video feeds should not be decided in this proceeding. However, to the extent the Commission does address the substance of this issue in this proceeding, Time Warner believes that extension of

(continued)

- OVS must-carry and PEG obligations must be coextensive with cable operator obligations;
- The fundamental principles of competitive neutrality and non-discrimination should govern (and define the permissible scope of) state and local government actions taken under their authority over public rights of way; and
- Both the 1996 Act and sound public policy support allowing cable operators to create open video systems.

## II. LECs MUST BE REQUIRED TO OFFER VIDEO SERVICE, INCLUDING OVS, THROUGH A SEPARATE SUBSIDIARY AND SUBJECT TO THE PART 64 COST ALLOCATION REQUIREMENTS TO RESTRAIN THEIR ABILITY TO CROSS-SUBSIDIZE ENTRY INTO VIDEO.

As demonstrated in Time Warner's comments and confirmed in the comments of numerous other parties, LECs have the incentive and the ability to cross-subsidize their entry into the video services business. Unless the Commission adopts and implements well-defined safeguards, LECs will systematically attempt to recover the costs of their entry into video services from subscribers to regulated telephone services. This, in turn, will diminish competition in the video business, and increase consumers' local telephone rates.

---

(footnote continued)

must-carry is infirm on constitutional, statutory, and policy grounds.

Two fundamental safeguards must be adopted to prevent such a result: (1) The Commission must require that LECs only offer video services through a structurally separate subsidiary,[3] and (2) the Commission must modify Part 64 for application to LEC video services and require LEC compliance with such cost allocation requirements prior to certification.

Requiring structurally separate subsidiaries for LEC provision of video services is supported by the National Association of Regulatory Utility Commissioners ("NARUC"), as well as numerous consumer and public interest organizations.[4] Although NARUC has not adopted a formal position for this proceeding, its generic positions on LEC provision of video programming within their telephone services areas include requiring such LECs to offer video programming through separate subsidiaries, as well as referring the jurisdictional allocation of video costs to a Federal State Joint Board.[5] The Consumer

---

[3] LEC video subsidiaries must maintain their own books, records, and accounts; have separate officers and directors; use separate operating personnel; conduct operations separately (including marketing); and obtain credit separately from the LEC.

[4] See, e.g., "Comments of the Alliance for Community Media, Alliance for Communications Democracy, Consumer Federation of America, Consumer Project on Technology, Center for Media Education, and People for the American Way," at 2-7 ("Consumer Alliance").

[5] NARUC Comments at 5.

Alliance argues that a separate subsidiary requirement for LEC provision of video services in their telephone service area is necessary to protect ratepayers from the substantial risk of cross-subsidization,[6] to protect and enhance competition among providers of video programming, and to assure reasonable OVS rates and nondiscriminatory access.[7] As demonstrated in Time Warner's comments,[8] the Commission plainly has authority to mandate a separate subsidiary requirement under section 653(a)(1) of the 1996 Act,[9] and sections 4(i), 201 and 202-205 of the Communications Act.[10]

Most LECs readily concede that Part 64 applies to their provision of video service. For example, Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications state that "[c]ommon carriers must comply with Part 64 before providing video programming services on either an open video system or a cable system,"[11] US West states that it

---

6 Comments of Consumer Alliance at 4-5.

7 Id. at 6-7.

8 Time Warner Comments at 11-12.

9 47 U.S.C. § 573(a)(1).

10 47 U.S.C. § 154(i), 47 U.S.C. §§ 201-205.

11 Comments of Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications, at 31 ("Joint Parties").

"expects that Part 64 would continue to be used to assign costs to unregulated and enhanced services provided in conjunction with video transport under OVS,"[12] and the United States Telephone Association ("USTA") acknowledges that the Commission's Part 64 rules apply to joint LEC provision of common carrier and non-common carrier services.[13]

Although application of Part 64 to LEC provision of video services is a foregone conclusion, simply applying Part 64 in its present form is insufficient. The Commission must modify Part 64 in this proceeding to address the particular characteristics of OVS. For example, the term "relative use", as applied in Part 64, specifically must be defined for OVS and any other video entry by LECs. The Commission also must determine whether costs should be allocated based on use of capacity, minutes of use, or some other measure. Whatever measure is chosen must further the central goal of Part 64: the protection of ratepayers of regulated services from either subsidizing the prices of nonregulated services or bearing the risk of imprudent telephone company investments in nonregulated services.

---

[12] US West Comments at 9.

[13] USTA Comments at 21.

The General Services Administration ("GSA")[14] echoes this concern. GSA states that "properly modified, . . . the Commission's Part 64 rules can provide an effective accounting safeguard to prevent the cross-subsidization of OVS by telephone ratepayers."[15] Indeed, US West acknowledged that Part 64 will need to be modified for application to LEC provision of video services by stating that "it is appropriate that the Commission reexamine Part 64 in light of large-scale regulated/unregulated operations that may be sharing a common infrastructure."[16]

LECs are simply wrong to suggest that Part 64 modifications, including necessary revisions to Cost Allocation Manuals, should not take place prior to Commission action on LEC OVS certification.[17] Changes must be implemented and Part 64 applied to LECs offering OVS in **this** proceeding, before telephone companies are permitted to obtain certification for and commit resources to OVS. Numerous commenters agree on that point.[18] If

---

[14] GSA, which describes itself as "directly or indirectly one of the largest users of telecommunications services in the nation. . . is concerned that it will be forced to subsidize [LEC] provision of video services." GSA Comments at 3.

[15] Id. at 4.

[16] US West Comments at 9-10.

[17] Joint Parties Comments at 31; USTA Comments at 21.

[18] GSA Comments at 5; Comments of the People of the State of California and the Public Utilities Commission of the State of

(continued)

the Commission waits until after OVS providers have been certified, changes subsequently required by the application of Part 64 will be difficult to accomplish and contentious, given that the OVS providers will already have begun construction in reliance on allocation rules applicable at the time of certification.

## III. RELYING ON THE COMPLAINT PROCESS TO ENSURE REASONABLE RATES AND NONDISCRIMINATORY ACCESS ESSENTIALLY WILL ALLOW OVS OPERATORS TO CONVERT OVS INTO AN UNREGULATED CABLE SYSTEM.

The complaint process established in Section 653, while necessary to ensure compliance with the statute and the Commission's rules, should not be relied upon exclusively to ensure nondiscriminatory access and reasonable and not unreasonably discriminatory rates.

Numerous LEC commenters suggest that the Commission adopt just such a complaint-driven approach.[19] For example, USTA argues that "[t]here is no need or basis for the Commission to attempt to develop extensive a priori regulations governing open video systems."[20] USTA also states that "[t]his enforcement power [the complaint process] is sufficient to ensure that open video

---

(footnote continued)

California at 12-13; Pennsylvania Public Utility Commission Comments at 8.

[19] USTA Comments at 4, 11; Joint Parties Comments at 6, 7; US West Comments at 4.

[20] USTA Comments at 4.

system operators comply with the nondiscrimination provision and other requirements of section 653."[21]

That is a flawed suggestion. First, the minimal, ad hoc, after-the-fact regulation that would be possible via the complaint process is inconsistent with the statutory policy underlying OVS. In providing for OVS, Congress balanced reduction of certain regulatory burdens against the assumption by OVS operators of certain regulatory obligations. For OVS to develop in accordance with the statutory model, those obligations need to be spelled out in advance so that the operator can know them and certify compliance with them.

Second, section 653(a) establishes a 10 day time frame for Commission action on OVS certifications. In these circumstances, the Commission cannot expect to ascertain on an ad hoc basis whether and to what extent an OVS system meets the statutory requirements unless it has established clear guidelines in this proceeding. There simply are too many issues to resolve in such an abbreviated time period.

Third, defining OVS obligations through a complaint process inherently will lead to fact-specific rulings, not general rules against which specific facts may be applied. In a complaint process, the Commission will revisit continually prior rulings,

---

[21] Id. at 11.

which will consume more Commission resources over time than will adopting general rules in the first instance.

Finally, relying on a complaint-driven process will only convert an OVS system into nothing more than an unregulated cable system -- the operators will immediately enjoy the benefits of reduced regulatory burdens while only later (if ever) fulfilling the corresponding obligations. Congress created OVS to be a new type of MVPD, relieving it of Title II obligations and many Title VI regulatory burdens. In exchange, Section 653 requires that the Commission implement a fundamentally different set of obligations. These include a nondiscrimination obligation with regard to access to OVS, an obligation to offer OVS access under reasonable and not unjustly and unreasonably discriminatory rates, terms and conditions, and a limitation on an OVS operator's ability to select programming if demand for capacity exceeds supply, among other obligations.[22]

Unless these OVS obligations are meaningful and clearly understood at the outset, OVS will not be a new type of MVPD as Congress intended, but merely an unregulated cable system. For

---

[22] These obligations are not discretionary. Under Section 653, the Commission "shall complete all actions necessary. . . to prescribe regulations that . . . prohibit an operator. . . from discriminating. . . and ensure that the rates, terms, and conditions for such carriage are just and reasonable." 47 U.S.C. § 573(b)(1)(A).

example, if the Commission does not implement standards against which the reasonableness of OVS rates may be judged (without first filing a complaint), OVS operators will be able to establish initial prices which are high enough to discourage most unaffiliated programmers. Providing OVS operators with all the rights associated with the OVS regulatory model, but none of the responsibilities, would clearly contravene Congressional intent.

## IV. CABLE OPERATORS SHOULD BE ALLOWED TO CREATE OPEN VIDEO SYSTEMS.

Some local community commenters argue that cable operators should not be allowed to establish and maintain an OVS.[23] However, such a limitation on the business options of cable operators is inconsistent with the 1996 Act and sound public policy and should be rejected.[24]

Section 653(a)(1) of the 1996 Act specifies that a telephone company may provide "cable service to its cable service customers" through an OVS facility and that "an operator of a cable system or any other person may provide video programming through an open video system" to the extent permitted by the

---

[23] Comments of Certain Political Subdivisions of the State of Minnesota at 13, 14 ("Minnesota Communities"); Comments of the City and County of Denver, Colorado at 7 ("Denver").

[24] The Commission should note that numerous LEC commenters support allowing cable operators to create OVS if they so desire. See Joint Parties Comments at 5-6; US West Comments at 2.

Commission. Some commenters argue that the language allowing telcos to offer "cable service" and cable operators and others to offer "video programming" should be interpreted to allow telcos to establish OVS, while restricting cable operators and others to offering video programming through a telco-owned OVS, if the Commission determines that such action would be in the public interest.[25]

This argument ignores two facts. First, Section 653(a)(1) specifically addresses Commission consideration of "Certificates of Compliance" for prospective OVS **operators**. Rules governing the allotment of capacity on an OVS to programmers are addressed in Section 653(b). As described by Cox Communications, Inc.:

> If Congress meant only to give the Commission discretion to permit cable operators and others to provide programming on a LEC OVS facility, but not to be OVS providers themselves, it would not have placed this provision in the section dealing with certification, which is a requirement applicable only to the OVS provider.[26]

The Commission should be guided by the clear intention of Congress; cable operators and others should be allowed to certify compliance with the OVS rules established in this proceeding and establish open video systems if the Commission determines that

---

[25] National League of Cities, et al. Comments at 46-48; Tandy Corporation Comments at 2-4.

[26] Cox Communications, Inc. Comments at 4.

such action would serve the public interest, convenience and necessity.

Second, regardless of how the language in question may be construed, Congress did not prohibit, nor did it require that the Commission prohibit, the creation of OVS by cable operators and other non-LECs. As discussed below, many commenters agree that sound policy supports allowing cable operators and others to create OVS. The public interest would best be served by giving cable operators and others the flexibility to choose OVS if this regulatory model fits their business plan.

Allowing cable operators and other non-LECs to establish OVS would enhance the development of this new type of MVPD, provide further outlets for unaffiliated video programmers,[27] and promote regulatory parity between MVPD competitors. A number of programmers concur with this assessment. Viacom, Inc. states that "[i]rrespective of who the OVS operator might be, Open Video Systems could offer the benefits of both enhanced programmer access to consumers and enhanced consumer access to diverse programming,"[28] and that allowing cable operators and others to create OVS "would not only fulfill Section 653's goals of enhancing competition and maximizing consumer choice' but in fact

---

[27] See Notice at ¶ 64.

[28] Viacom, Inc. Comments at 7.

would comport with the pro-competition and regulatory parity tenets of the 1996 Act as a whole."[29] Similarly, the Motion Picture Association of America ("MPAA") states that because many Title VI obligations are not applicable to OVS, the only way to encourage robust facilities-based competition and to maintain a level playing field "is to ensure that the same regulatory advantages accorded OVS operators and/or MVPDs using OVS facilities are available to cable operators who opt to utilize their own facilities for OVS."[30]

## V. "FEES ON THE GROSS REVENUE OF THE OPERATOR" ASSESSED IN LIEU OF FRANCHISE FEES SHOULD BE BASED ON ALL OVS REVENUES, WHETHER DERIVED FROM PROGRAMMERS OR END USERS.

Section 653(c)(2)(B) of the 1996 Act makes OVS operators subject to "payment of fees on the gross revenues of the operator for the provision of cable service." The Conference Report states that in an "effort to ensure parity among video providers, the conferees state that such fees may only be assessed on revenues derived from comparable cable services."[31]

This language clearly indicates that OVS operator gross revenue fees should be assessed on all OVS revenue, whether

---

[29] Id.

[30] MPAA Comments at 11.

[31] S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 178 (1996).

derived from programmers or end users. Only in this manner will the gross revenue assessment be derived from "comparable cable service revenues." If OVS operators are not required to pay a gross revenue fee on fees paid by programmers and packagers for access to the OVS, then the OVS operator's fee will be understated. This is because the OVS gross revenue fee is apparently levied on "an operator of an open video system under this part,"[32] not unaffiliated programmers.[33] Therefore, the OVS gross revenue fee must be derived from revenues attributed to fees paid by programmers and programmer/packagers purchasing access to the OVS.[34]

## VI. NEITHER CABLE NOR OVS OPERATORS SHOULD BE REQUIRED TO CARRY BOTH ATV AND NTSC BROADCAST FEEDS DURING THE TRANSITION TO DIGITAL BROADCASTING.

The National Association of Broadcasters ("NAB") argues that "[d]uring the transition from NTSC to digital television, open video systems that have the capability to carry digital signals should, like cable systems, be obliged to carry both the analog and digital signals of local stations."[35] Time Warner does not

---

[32] 47 U.S.C. § 573(c)(2)(B).

[33] Revenues of affiliated packagers must be included in the OVS operator's revenue subject to the gross revenue fee.

[34] Such a requirement is supported by the Consumer Alliance. Consumer Alliance Comments at 37-38.

[35] NAB Comments at 15. See also Capital Cities/ABC Comments at 10.

believe that the decision of whether to extend the must-carry rules beyond their present scope should be made in the context of this proceeding. The Commission is already considering this issue in the context of the anticipated conversion to digital broadcasting.[36] However, to the extent the Commission considers this issue here, Time Warner submits that imposing such an obligation on either cable or OVS operators is unconstitutional and inconsistent with both law and policy and should not be adopted.

Time Warner believes the underlying must-carry rules are unconstitutional.[37] However, even assuming arguendo that the must-carry rules as presently applied and enforced are constitutional, there is no basis upon which the proposed sweeping extension can be justified. In remanding the Turner case to the three-judge district court, the Supreme Court agreed that the constitutional status of must-carry would turn on whether the viability of the local broadcasting system was threatened without must-carry and, if so, whether the must-carry

---

[36] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry, FCC 95-315, MM Docket No. 87-268 (released August 9, 1995).

[37] The constitutionality of the current must-carry rules is currently before the Supreme Court. See Turner Broadcasting System, Inc. v. FCC, 910 F. Supp. 734 (D.D.C. 1995) (three judge court), on appeal, U.S. Supreme Court Case No. 95-992.

provisions are narrowly tailored to achieve that objective.[38] Congress has not made a finding that the viability of local broadcasting is threatened if transmissions beyond the current primary video feed are not carried by cable operators. Nor can it reasonably be argued that must-carry, so extended, would be narrowly tailored to achieve this result. At best, the current must-carry rules are teetering on the brink of unconstitutionality; in these circumstances, extension of the rules beyond the primary video service is totally unjustified.

Carriage of broadcast signals beyond the primary video is not required by the must-carry provisions of the Communications Act. Sections 614(b)(3) and 615(g)(1) of the Communications Act require a cable operator to carry "the **primary video,** accompanying audio, and line 21 closed caption transmission" of qualifying commercial and noncommercial broadcasters.[39] The Act requires carriage of the "primary video" feed; therefore, cable operators may satisfy their must-carry obligations by carrying

---

[38] Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2471-2472 (1994).

[39] 47 U.S.C. §§ 534(b)(3) and 535(g)(1) (emphasis added).

the broadcaster's principal video service.[40] If Congress intended that cable operators carry **all** NTSC and ATV signals offered by a broadcaster (either at the time of enactment or in the future) under must-carry, Congress would not have included the "primary video" qualifier.

The 1992 Cable Act provision addressing advanced television broadcasting supports this conclusion. This provision specifies only a reformatting of the current programming delivered in the NTSC primary video feed. The plain language of 47 U.S.C. § 534(b)(4)(B) is designed to ensure continued carriage of broadcasters' current primary video service and to maintain a high quality signal upon conversion to the ATV format. Because the 1996 Act specifies that OVS must-carry obligations be no greater or lesser than cable operator obligations, this statutory interpretation should define OVS must-carry obligations as well.

Mandatory carriage of all signals beyond the primary video feed is also bad policy. The extent to which cable and OVS operators will implement digital television is unclear. Some (perhaps all) OVS and cable operators will partially convert to digital. Thus, many systems will very likely face severe channel

---

[40] A broadcaster's principal or primary video service should be defined during the transition period as a broadcaster's NTSC signal. After the transition period, a broadcaster's primary video service should be defined as the primary digital video stream previously carried in a broadcaster's NTSC signal.

availability restrictions, if indeed additional channel space is available at all. Non-broadcast programmers and viewers will bear the lion's share of this burden through loss of market share and program availability. At the very least, extension of must-carry obligations to signals beyond the primary video service is premature.

## VII. STATE AND LOCAL ACTIONS TAKEN UNDER AUTHORITY OVER RIGHTS OF WAY MUST BE COMPETITIVELY NEUTRAL AND NON-DISCRIMINATORY.

The National League of Cities and others argue at length that Congress was essentially without constitutional authority to authorize the Commission to adopt OVS rules that restrict state and local regulation conducted under the aegis of the power to regulate the use of public rights-of-way.[41] In contrast, Bell Atlantic, et al., contend that Congress intended for OVS operators to be subject to substantially reduced regulation at the federal, state, or local level.[42]

Congress intended neither extreme. Rather, Congress specified that state and local regulation of OVS under the right-of-way power is permissible to the extent that it complies with the same fundamental policy criteria that are to govern federal

---

41 National League of Cities et al. Comments at 52-73.

42 Joint Parties Comments at 4-5.

policies for OVS: (1) competitive neutrality and (2) nondiscrimination.[43]

## VIII. OVS MUST-CARRY, PEG, AND OTHER TITLE VI OBLIGATIONS SHOULD BE COEXTENSIVE WITH CABLE OPERATOR OBLIGATIONS.

In creating OVS, Congress painstakingly specified the Title VI provisions applicable to OVS operators. Congress stated that these provisions should impose "obligations that are no greater **or lesser** than the obligations" imposed on cable operators.[44] Thus, the Commission must ensure that all the Title VI obligations applicable to OVS are applied on the same terms as they are applied to cable operators.

Many commenters support these principles. Broadcasters state that the must-carry and retransmission consent schemes must be applied intact to OVS.[45] Indeed, NBC states that "there are

---

[43] Conference Report at 178. Similar language is used in new Section 253(c) in connection with state and local regulation of telecommunications carriers' use of rights of way: "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a **competitively neutral and nondiscriminatory basis**, for use of public rights-of-way on a **nondiscriminatory** basis . . .." 47 U.S.C. § 253(c) (emphasis added).

[44] 47 U.S.C. § 573(c)(2)(A) (emphasis added). Time Warner's challenge to the constitutionality of various Title VI provisions, including those relating to PEG and leased access, is now before the United States Court of Appeals for the D.C. Circuit in Time Warner Entertainment Co., L.P. v. FCC, No. 93-5349 (argued 20 Nov. 1995).

[45] CBS Comments at 6; Capital Cities/ABC Comments at 4.

no public policy reasons to justify treating an OVS operator differently from a cable system operating in the same local market for the purposes of broadcast signal carriage."[46]

Similarly, many local franchising authorities ("LFAs") agree that OVS operators are required by the 1996 Act to assume public, educational, or governmental ("PEG") channel obligations equivalent to those assumed by the cable operator.[47] To implement this Congressional intent, the Commission must adopt rules which ensure that cable and OVS operators have equal burdens associated with PEG obligations. The methodology used to establish "equal burdens" must not only reflect the direct costs of PEG obligations, but also the cable operator's prior investment in PEG facilities and equipment, as well as overhead and administrative costs. In any event, OVS operators should not be allowed to negotiate lesser PEG burdens than those borne by the incumbent cable operator. Only in this manner will the Commission fulfill the Act's mandate for OVS operator provision

---

[46] NBC Comments at 4.

[47] Comments of the Cities of Dallas, Denton, Houston, Plano, Fort Worth, Arlington, Irving, Longview and Brownsfield, Texas at 8 ("Texas Communities"); Comments of the City of Olathe, Kansas, at 5; Minnesota Communities Comments at 5; Denver Comments at 4; Comments of the New York City Department of Information Technology and Telecommunications at 6; Comments of the Greater Metropolitan Cable Consortium (Denver, Colorado) at 1.

of PEG channels and support for such channels pursuant to Section 611 on the same basis as cable operators.

Bell Atlantic, et al., argue that OVS is feasible and viable only if it is subject to a diluted version of the regulatory requirements applicable to cable operators, including OVS (e.g., PEG).[48] If one assumes that those regulatory obligations from which Bell Atlantic, et al. seek relief serve a public purpose, then there is no reason to excuse OVS from competitively neutral and nondiscriminatory compliance with them. If video competition via OVS is not feasible if federal and state regulatory obligations have to be met, that may suggest the need to reduce those obligations for all video service providers, but it provides no basis for a selective and discriminatory exemption for OVS operators.

Finally, as a further assurance of equal obligations, the Commission also should adopt a rule prohibiting LECs from engaging in "economic redlining." The Communications Act contains an anti-redlining provision for cable operators, and many local franchising authorities impose similar prohibitions. Narrowly targeted entry into the video business by telcos will limit the benefits of competition to targeted areas which likely already have the best access to competitive alternatives. Low

---

[48] Joint Parties Comments at 5-6.